

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Dr. SHIVA AYYADURAI,

Plaintiff,

v.

WILLIAM FRANCIS GALVIN,
MICHELLE K. TASSINARI,
DEBRA O'MALLEY,
AMY COHEN,
NATIONAL ASSOCIATION OF
STATE ELECTION DIRECTORS,
all in their individual capacities, and
WILLIAM FRANCIS GALVIN,
in his official capacity as the Secretary
of the Commonwealth of Massachusetts,

Defendants, and

TWITTER, INC.,

Proposed Additional Defendant.

Case No.: 1:20-cv-11889-MLW

STATUS REPORT

The Parties respectfully submit this status report in compliance with the Court's order at the June 15, 2021 hearing that the Parties and non-party Twitter, Inc. ("Twitter") meet and confer, and submit a report, by June 24, 2021 regarding whether they have reached agreement on any of the issues in this matter including, without limitation, whether Twitter, without prejudice to any of its arguments or defenses, wishes to address Plaintiff's proposed revised Second Amended Complaint ("SAC") via a motion to dismiss rather than by opposing a motion for leave to amend the currently operative complaint.

The Parties and Twitter have not reached any agreement as to any of the issues pending before the Court, though they continue to talk. In particular, the Parties and Twitter have not reached any agreement as to whether Dr. Shiva may file his revised proposed Second Amended Complaint (“SAC”) without the necessity of moving for leave to do so. During a meet and confer among the Parties and Twitter, Dr. Shiva’s counsel apprised the Defendants and Twitter of the following:

1. Dr. Shiva is prepared to seek leave to amend but, in that event, he does not agree that Twitter has standing to oppose his motion as it is not yet a party to this case. Dr. Shiva made clear that if Twitter seeks to oppose his motion to amend, as opposed to filing a motion once his proposed new complaint is served, then he reserves his right to argue that it has waived its forum selection clause argument.

2. Dr. Shiva further made clear that, alternatively, he is willing to file his Second Amended Complaint (together with the briefing the Court has required) by agreement with no leave to amend necessary on or before July 15, 2021 and then serve Twitter. At that point, Twitter may respond with a motion while fully preserving its arguments. Dr. Shiva has made clear he is fine with either approach.

3. Last, Dr. Shiva stated that has not yet made a final determination regarding: (i) whether to continue to include the individuals as defendants personally where he is still reviewing applicable qualified immunity law; or (ii) whether to name Twitter as a defendant. However, Dr. Shiva has now decided to name Twitter as a defendant.

All Defendants took the position that without knowing Dr. Shiva’s position as to the claims and parties which will be in his amended complaint, they are unable to make a decision regarding whether they will agree to challenge the SAC via a motion to dismiss, or insist that Dr.

Shiva seek leave amend the operative complaint. Dr. Shiva notes that the Commonwealth Defendants—including William Francis Galvin in his personal and official capacities and Michelle K. Tassinari and Debra O’Malley in their individual capacities—took the position during the June 15, 2021 scheduling conference as follows:

Your Honor correctly forecast that the Commonwealth defendants' preference for addressing the new second amended complaint would likely be to deal with it on a motion to dismiss, not as an opposition to a motion to amend, though inasmuch as plaintiff's counsel has not yet indicated what the claims are in suit, let alone who the claims would be against, it's a little bit difficult for me to express that view with any certainty.

Transcript of June 15, 2021 Hearing at 27:15–22, attached here as Exhibit A.

The Defendants now state that Secretary Galvin, in his official capacity, likely does not require a motion for leave to amend, and neither does the National Association of State Election Directors (“NASED”), provided the new complaint does not include a claim for money damages against Secretary Galvin, NASED, or the individual defendants. However, the individual defendants, if they remain parties, will likely require that Plaintiff file a motion for leave to amend that the individual defendants would likely oppose as futile, although the Defendants cannot make a final decision until Plaintiff determines what claims he will ultimately pursue in a new complaint.

Non-party Twitter has authorized the Parties to report that if the second amended complaint that Plaintiff files or proposes to file in accordance with this Court’s June 16 order (Dkt. 14) names Twitter as a defendant, Twitter will, instead of seeking to litigate whether Plaintiff should be granted leave to file that pleading, follow the course that this Court has indicated would be its procedural preference and intention (see June 15, 2021 Tr. at 24-61, 60): that is, on the express understanding and condition that Twitter will be deemed to have reserved and preserved all of its procedural and substantive defenses to any such complaint, including

those arising from the forum selection clause in its User Agreement (*see id.* at 47-48, 60-61), Twitter will timely respond to such complaint by way of a motion to dismiss pursuant to Fed. R. Civ. P. Rule 12 and/or transfer pursuant to 28 U.S.C. §§ 1404 or 1406.

Dr. Shiva will continue to seek to meet and confer with Defendants and Twitter in an effort to resolve the legal and procedural issues before the Court. Dr. Shiva further notes that he has made a settlement proposal to Defendants and Twitter to resolve this matter in its entirety.

Respectfully submitted,

Dr. SHIVA AYYADURAI,

By his attorneys,

/s/ Benjamin J. Wish

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Dated: June 24, 2021

CERTIFICATE OF SERVICE

I, Benjamin J. Wish, hereby certify that this document has been filed through the ECF system, will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF) and paper copies will be sent to those indicated as non-registered participants on this date.

Dated: June 24, 2021

/s/ Benjamin J. Wish
Benjamin J. Wish